Shafruddin bin Selengka v PP and other appeals

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS 42–102–93, 42–12–93 AND 42–90–93
SYED AHMAD IDID J
7 SEPTEMBER 1994

Criminal Procedure *— Sentence — Enhancement — Whether prosecution can request for enhancement at accused's appeal — Whether proper course is for prosecution to appeal — Whether court can enhance sentence where accused appeals for reduction of sentence — Criminal Procedure Code (FMS Cap 6) s 316(b)*

Criminal Procedure *— Sentence — Concurrent or consecutive — Accused already servind sentence — Effect of s 292(i) & (ii) of the Criminal Procedure Code (FMS Cap 6) — Factors to be taken into account — Type of offence — Psychological effect of crime on victim of molestation — Criminal Procedure Code (FMS Cap 6) s 292(i), (ii)*

In the first appeal, the appellant ('the first appellant') was sentenced to seven years' imprisonment and three stroke of the rotan on each of two charges of committing robbery while armed with a deadly weapon, ie offences under ss 392 and 397 read with s 35 of the Penal Code (FMS Cap 45) ('the Penal Code'). The sentences were ordered to run concurrently. The appellant appealed against the sentence. At the appeal, the prosecution asked for the sentences to run consecutively.

The second appellant was convicted of commiting gang robbery under s 395 of the Penal Code and sentenced to ten years' imprisonment and five strokes of the rotan, which sentence was ordered to run concurrently with a previous sentence of seven years and six strokes which he was still undergoing at the time of conviction.

The third appellant was convicted under s 377B of the Penal Code on a charge of committing carnal intercourse against the order of nature and under s 354 for assault with intent to outrage modesty. He was sentenced to 15 years' imprisonment and six strokes for the first offence and five years' imprisonment and two strokes for the second offence. He had previous convictions for buggery with an animal, armed robbery and possession of stolen goods and was also still undergoing a previous sentence.

Held, dismissing the appeals:

(1) If the prosecution considers a sentence insufficient and wants it increased or enhanced, the legal course would be to appeal. It was not proper for the prosecution to ask court at the hearing of the appellant's appeal for the sentences to run consecutively.

(2) In the first appeal, as what actually occurred was one robbery against two persons, the court confirmed and maintained the first appellant's sentences on a concurrent basis.

(3) Although the court could, under s 292(i) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), order the second appellant's imprisonment to start 'immediately', ie at the date the sentence was passed, that would negate the provisions of s 292(ii). Therefore, the court ordered the prison term to start from the time his previous term was to end.

(4) While the court was concerned with the third appellant's claim that he has a son to take care of, it was also concerned for the psychological effect his crime has had on the 15-year-old girl he had molested. Therefore, under s 292(i), the sentence should begin at the expiration of his previous sentence. The other factors taken into consideration were the type of crimes committed and the hope that the imprisonment term would enable some medical treatment to be given to him to curb his lust and help him reform.

Obiter:

If the prosecution wishes for an enhancement of a sentence, the court may, where the accused appeals for reduction of his sentence, enhance the sentence within s 316(b) of the CPC. This, however, should only be done in exceptional cases and on good and sufficient grounds since in cases where the appeal is for the reduction of a sentence, the exercise of powers to enhance the sentence can discourage appeals.

[Bahasa Malaysia summary

Di dalam rayuan pertama, perayu ('perayu pertama') telah dihukum penjara tujuh tahun dan sebatan rotan sebanyak tiga kali bagi setiap tuduhan melakukan rompakan ketika bersenjata maut, iaitu kesalahan di bawah ss 392 dan 397 dibaca dengan s 35 Kanun Keseksaan (FMS Bab 45) ('Kanun Keseksaan'). Hukuman itu diperintah supaya dijalankan bersama. Perayu telah membuat rayuan terhadap hukuman itu. Pada rayuan itu, pihak pendakwa telah memohon supaya hukuman itu berjalan berturutan.

Perayu kedua telah disabit atas kesalahan melakukan rompakan berkumpulan di bawah s 395 Kanun Keseksaan dan dihukum penjara sepuluh tahun dan lima sebatan rotan, dan hukuman itu diperintah supaya berjalan bersama dengan suatu hukuman penjara tujuh tahun dan enam sebatan yang terdahulu dan yang beliau masih sedang menjalani pada masa sabitan.

Perayu ketiga telah disabit di bawah s 377B Kanun Keseksaan atas tuduhan melakukan persetubuhan yang bertentangan dengan aturan tabii dan di bawah s 354 kerana menyerang seorang dengan niat hendak mencabul kehormatan. Beliau telah dihukum penjara 15 tahun dan enam sebatan rotan untuk kesalahan pertama dan penjara lima tahun dan dua sebatan bagi kesalahan kedua. Beliau mempunyai sabitan terdahulu untuk kesalahan persetubuhan luar tabii dengan

haiwan, rompakan bersenjata dan menyimpan harta curi dan juga masih menjalani suatu hukuman yang terdahulu. A

Diputuskan, menolak rayuan itu:

(1) Jika pihak pendakwa berpendapat bahawa sesuatu hukuman itu tidak mencukupi dan mahukan ia ditambahkan, tindakan undang-undang yang sepatutnya diambil adalah untuk membuat rayuan. Adalah tidak betul untuk pihak pendakwa meminta mahkamah pada pendengaran rayuan perayu supaya hukuman itu berjalan berturutan. B

(2) Di rayuan pertama, oleh kerana apa yang sebenarnya telah berlaku adalah satu rompakan terhadap dua orang, mahkamah telah mengesahkan dan mengekalkan hukuman bersama itu. C

(3) Walaupun mahkamah boleh, di bawah s 292(i) Kanun Acara Jenayah (FMS Bab 6) ('KAJ itu'), memerintahkan supaya pemenjaraan perayu itu bermula dengan 'segera', iaitu pada tarikh hukuman itu dijatuhkan, itu akan menidakkan peruntukan s 292(ii). Oleh itu, mahkamah telah memerintahkan supaya tempoh pemenjaraannya bermula apabila tempohnya yang terdahulu itu tamat. D

(4) Sementara mahkamah mengambil berat tentang penegasan perayu bahawa beliau mempunyai seorang anak untuk membela, ia juga mengambil berat tentang kesan psikologi yang diakibatkan oleh jenayah beliau itu ke atas budak perempuan yang berumur 15 tahun yang telah diperkosa olehnya. Dengan yang demikian, di bawah s 292(i), hukuman itu seharusnya bermula pada penamatan hukumannya yang terdahulu. Faktor lain yang dipertimbangkan adalah jenis kesalahan yang dilakukan dan harapan bahawa tempoh pemenjaraan itu akan membolehkan rawatan perubatan diberikan kepadanya untuk mengawal hawa nafsunya dan menolong beliau mengubah perangainya. E F

Obiter: G

Jika pihak pendakwa ingin menambahkan suatu hukuman, mahkamah boleh, di mana tertuduh membuat rayuan untuk suatu pengurangan hukumannya, menambahkan hukuman itu di bawah s 316(b) KAJ itu. Bagaimanapun, ini seharusnya dilakukan hanya di dalam kes yang luar biasa atas alasan yang baik dan yang mencukupi kerana di dalam kes di mana rayuan itu adalah untuk suatu pengurangan hukuman, penggunaan kuasa untuk menambahkan hukuman itu tidak akan menggalakkan rayuan.] H

Notes

For cases on sentencing, see 5 *Mallal's Digest* (4th Ed) paras 2069–2086, 2138–2143; [1989] Mallal's Digest 1424–1426; [1990] Mallal's Digest 381; [1991] Mallal's Digest 923–924, 930; [1992] Mallal's Digest 817–818; [1993] Mallal's Digest 670. I

A **Cases referred to**

Kanagasuntharam v PP [1992] 1 SLR 81 (refd)
New Tuck Shen v PP [1982] 1 MLJ 27 (folld)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)

B **Legislation referred to**

Criminal Procedure Code (FMS Cap 6) ss 282(d), 292, 307(vi), 313(ii), 314(i), (ii), 315, 316(b)
Penal Code (FMS Cap 45) ss 35, 392, 397

C The appellants were self-represented.

Ganesan Somasundram (Deputy Public Prosecutor) for the respondent in Criminal Appeal No 42–102–93.

Mohd Jamil bin Hussin (Deputy Public Prosecutor) for the respondent in Criminal Appeal Nos 42–12–1993 and 42–90–93).

D **Syed Ahmad Idid J**: I have decided to write the grounds of the three decisions as they touch on two important aspects which come up frequently in our subordinate courts:

(i) when to order concurrent (or consecutive) sentences; and

E (ii) in cases where the accused is undergoing imprisonment, when should his imprisonment begin?

Shafruddin bin Selengka

The accused was charged for committing robbery against two persons F whilst armed with a deadly weapon (a revolver) in the company of two others — ss 392 and 397 read with s 35 of the Penal Code (FMS Cap 45) ('the Penal Code'). As the offence(s) took place between the hours of sunset and sunrise, the punishment under s 392 'may be extended to 14 years and shall also be liable to fine or whipping'. He was charged on two separate charges.

G He appealed against the sentence passed by the learned sessions court judge of seven years 'dan disebat tiga kali' for each of the first and second charges (to run concurrently).

His two accomplices are still at large and it was admitted that a revolver was used. The deputy public prosecutor ('the DPP') informed the H court that the accused played a major role at the robbery. The value of the items (cash and gold) seized came up to RM3,800. At the appeal, the learned DPP asked the court to impose consecutive sentences.

It was not quite proper for the learned DPP to suddenly ask in court for the sentences to run consecutively. If indeed the accused was deserving I of such a sentence, the Public Prosecutor ('the PP') should have appealed against the sentences in the first place. Section 307(i) of the Criminal Procedure Code (FMS Cap 6) ('the CPC') clearly spells out that 'any person who is dissatisfied with any ... sentence ... may prefer an appeal to

the High Court against such ... sentence ... on the ground ... of the alleged *inadequacy* of any sentence ...'. A

While I am of the opinion that the better course, where the prosecution wishes for an enhancement of a sentence, is to file an appeal accordingly, the court may (within s 316(b) of the CPC itself) enhance the sentence where the accused appealed for reduction of his sentence. This, I think, should be done in rare and exceptional cases where only on good and sufficient grounds such a course is preferable. B

Where the appeal is for the reduction of a sentence, the exercise of the powers to enhance the sentence instead can curb or discourage appeals. I am, however, of the view such power ought not to be used willy-nilly as a matter of public policy. If the PP considers the sentence insufficient and he wants the court to increase or enhance it, the legal course would be for the PP to appeal accordingly. C

This should be followed up by a petition stating shortly the substance of the judgment appealed against and shall contain definite particulars of the points of law (s 307(vi) CPC). D

Then at the hearing, the court may review the finding and maintain or reduce or enhance the sentence or alter the nature of the sentence (s 316(b) CPC).

In this case, having considered the fact that what actually occurred was one robbery against two persons, I decided to confirm and maintain the sentences on a concurrent basis. A very useful and instructive discussion on this point may be seen in *Sau Soo Kim v PP* [1975] 2 MLJ 134 at pp 136–137. E

When I ordered that the imposition of concurrent sentences be maintained, I had taken into account the discussion in the *Magistrates' Court Handbook* (1994) at pp 198–199. F

Rahmad bin Baidi

The accused faced a charge of gang robbery under s 395 of the Penal Code. After a trial, he was convicted and sentenced to ten years' imprisonment plus five strokes of the rattan. G

At the time he was convicted, he was undergoing a previous sentence of seven years and six strokes.

The sessions court ordered that the ten years' imprisonment run concurrently with the term he was serving then. H

The sessions court judge in imposing the sentence of imprisonment was of the view that this was to protect the public as such offences were rampant and the safety of property was in jeopardy.

The appellant urged upon the court that he needed 'kasih sayang dan bantuan'. He said that his old folks live in an Indonesian kampung and that he has repented. I

A In line with the case of *New Tuck Shen v PP* [1982] 1 MLJ 27, I took into account that the accused had a previous conviction for a similar offence in 1986.

In accordance with s 292 of the CPC, I ordered the prison term to start from the time his present term ends. I could order the imprisonment B to start 'immediately' (as at the date the sentence was passed) but then that would negate the provisions of s 292(ii) of the CPC.

Azhar bin Mohd Nor

The accused was convicted on two charges under:

C (i) s 377B (voluntarily committing carnal intercourse against the order of nature) 'dengan memasukkan zakar ke dalam mulut'; and

(ii) s 354 of the Penal Code (assault or use of criminal force to a person with intent to outrage her modesty).

D On the first charge, he was sentenced to 15 years' imprisonment and 'enam kali sebatan' and for the second offence to five years and 'dua kali sebatan'. See *Kanagasuntharam v PP* [1992] 1 SLR 81. The court ordered that the concurrent sentences were to run after the accused had completed his sentence on an earlier case, No 62–55–90.

The accused had been sentenced in the earlier case on 15 January E 1992 to 12 years with three strokes for a s 377 ('buggery with an animal') offence. He had four other previous convictions for theft (1986), possession of goods over which he could not explain, possession of stolen goods and of theft again (1987) and robbery while armed with a weapon (1991).

The sessions court judge, considering the matter which is the subject F of this appeal, imposed the sentences on 20 October 1993.

The appellant stated that the sentence of the previous case will end on 25 March 2001 and so if this present sentence were then to begin, he will have to serve in prison until 25 March 2011. He opined that in all he would have to serve 29 years and six months which is very long. The G appellant is aged 31 and with ⅓ remission he may only be out when he is 49 years old.

The appellant, therefore, urged the court to back date his sentence to the date of his arrest, ie 6 March 1991 (and not from after the end of the present term in the previous conviction).

H The issue I had to deal with was whether the appellant deserved a break. The learned DPP agreed with the learned sessions court judge who exercised his discretion under s 292 of the CPC.

Section 292(i) states:

> When a person who ... is undergoing a sentence of imprisonment is sentenced I to imprisonment, such imprisonment shall commence *either immediately or at the expiration of the imprisonment to which he has been previously sentenced,* as the Court awarding the sentence may direct. ...

And s 292(ii):

> Nothing in the last preceding subsection shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

The provisions as to execution of a sentence of imprisonment at s 282(d) of the CPC specify that, 'every sentence of imprisonment shall take effect from the date on which the same was passed unless the Court passing such sentence otherwise directs'.

Section 292 is in respect of the commencement of imprisonment on a prisoner already undergoing imprisonment, and this is exactly the situation the appellant is in.

While I was concerned with the appellant's claim that he has a son to take care of, I was also concerned for the psychological effect his crime has had on the young girl (aged 15) whom he had molested. So I rejected his appeal in preference of s 292(i) and, as his crime was serious, I decided that the sentence in this appeal shall begin at the expiration of the imprisonment to which he has been previously sentenced.

One other factor I took into consideration is the type of crimes he had committed. I hope his imprisonment term will enable some medical treatment to be given to curb his lust and help him reform.

Observations regarding delays in hearing appeals due to absence of the appellant or the respondent

I have come across appeal cases where postponements were granted on more than 15 occasions at the High Court. The excuses advanced were:

(i) the appellant did not appear; or

(ii) the respondent was absent as the notice of appeal was not duly served on him.

In most instances, the appellants or the respondents were individuals, eg in appeals against convictions and/or sentences or against acquittal, respectively.

All officers of the court including the DPP and counsel are reminded that:

(a) by s 313(ii) of the CPC, 'If the appellant does not appear to support his appeal the court may consider his appeal and may make such order thereon as it thinks fit'.

The court may, however, refuse to consider the appeal or to make any such order, in the case of an appellant who does not appear personally before the court in pursuance of a condition upon which he was admitted to bail.

(b) by s 314(i) of the CPC, where the respondent is not present and the court is not satisfied that the notice of appeal was duly served upon him, then the court shall not make any order in the matter of the

A appeal adverse to or to the prejudice of the respondent, but shall adjourn the hearing of the appeal to a future day for his appearance. The court will then issue the requisite notice to him for service through the registrar. Then by s 314(ii), if the service of such notice cannot be effected on the respondent, the court shall proceed to hear the appeal in his absence.

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And where an appeal is presented against an acquittal, a judge may issue a warrant directing that the accused be arrested and brought before him, and may commit him to prison pending the disposal of the appeal or admit him to bail (s 315 of the CPC).

C With all these provisions in the CPC, there should not be any more excuses on either side to delay the hearing and disposal of appeals. The learned counsel will inform their clients to be present and the DPP likewise will act suitably as the occasion may require or when the circumstances may dictate, as the law allows.

D *Order accordingly.*

Reported by Anne Khoo

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